LING SIOK SENG

v.

TING SIEH CHUNG

COURT OF APPEAL, KUCHING
LAMIN MOHD YUNUS PCA
ABDUL MALEK AHMAD JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: Q-02-715 OF 1996]
27 JULY 1998

CIVIL PROCEDURE: *Appeal - Notice of appeal - Application for extension of time to serve - Whether sufficient reasons produced*

This was a motion by the appellant for an extension of time to serve a notice of appeal on the respondent. Although counsel for the appellant conceded that the notice of appeal was not personally served on the respondent due to an oversight, he submitted that the respondent was aware of the notice of appeal.

There was however no evidence on the reasons for the non-service of the notice of appeal and the delay in making the present application.

Held:
Per Ahmad Fairuz JCA

[1] The appellant's affidavit-in-support did not disclose any explanation as to why the notice of appeal was not served on the respondent nor any reasons as to why there was a delay in filing this application. There was therefore no evidential material on the reasons for the non-service of the notice of appeal and the delay in making the application.

[2] There were therefore no sufficient grounds to grant an extension of time to serve the notice of appeal and to file and serve the record of appeal on the respondent. As the notice of appeal had never been served on the respondent, the appeal was therefore incompetent and there was in fact no appeal in existence.

[Order accordingly.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini merupakan usul oleh perayu untuk perlanjutan masa untuk menyerahkan notis rayuan kepada responden. Walaupun peguam untuk perayu telah bersetuju bahawa notis rayuan telah tidak diserahkan atas diri responden oleh disebabkan ketidaksedaran peguam, dia menghujahkan bahawa responden telah sedar akan notis rayuan tersebut.

Walau bagaimanapun tidak terdapatnya keterangan material atas sebab-sebab mengapa notis rayuan tidak diserahkan dan kelewatan dalam membuat permohonan ini.

Diputuskan:
Oleh Ahmad Fairuz HMR

[1] Afidavit sokongan perayu tidak memberikan sebarang sebab mengapa notis rayuan telah tidak diserahkan kepada responden ataupun sebab-sebab mengapa terdapatnya kelewatan dalam memfailkan permohonan ini. Maka tidak terdapatnya keterangan yang material atas sebab-sebab mengapa notis rayuan tidak diserahkan dan sebab kelewatan dalam permohonan ini.

[2] Maka tidak terdapatnya dasar-dasar yang mencukupi untuk memberikan perlanjutan masa untuk menyerahkan notis rayuan dan untuk memfailkan dan menyerahkan rekod rayuan kepada responden. Oleh keranan notis rayuan telah tidak diserahkan kepada responden, maka rayuan tersebut adalah tidak sah dan pada hakikatnya, rayuan tersebut tidak wujud.

[Perintah sekadarnya.]

Cases referred to:
Lee Lan v. Lim Yoon Loy & Ors [1991] 3 CLJ 2393 ***(cit)***
Pearson v. Chen Chien Wen Edwin [1991] 3 MLJ 208 ***(cit)***
Soh Keng Hian v. American International Assurance Co Ltd [1996] 2 CLJ 449 ***(refd)***
Yeo Yoo Teik v. Jemaah Pengadilan Sewa, Pulau Pinang & Anor [1996] 2 CLJ 628 ***(refd)***

Other sources referred to:
Practice Direction No 2 of 1991
Practice Direction No 1 of 1996 (Court of Appeal)

For the appellant - Musa Dinggat; M/s Battenberg & Talma Advoc
For the respondent - Chong Siew Chiang; M/s Kadir, Wong, Lin & Co

[Appeal from High Court, Bintulu; Suit No: BTU 5 of 1994]

Reported by Mariette Peters-Goh

JUDGMENT

Ahmad Fairuz JCA:

This is a motion by the appellant/plaintiff for an extension of time to serve the notice of appeal on the respondent. By way of this motion too, the appellant sought to file and serve the record of appeal on the respondent.

The affidavit-in-support of the motion discloses that:

(a) the judgment of the High Court in Sabah and Sarawak at Bintulu was given on 22 November 1996;

(b) the appellant's counsel's letter of 29 November 1996 (exhibited as 'JAT 2') addressed to the respondent's counsel, enclosed the notice of appeal;

(c) the receipt proving the posting of 'JAT 2' by registered mail could not be found;

(d) the respondent was "aware of the notice of appeal as he responded to the appellant/plaintiff's application for stay of execution";

(e) the respondent's counsel's letter of 7 January 1997 also showed that the respondent was aware of the notice of appeal;

(f) the appellant had, on 23 December 1996, written to the Senior Assistant Registrar, High Court Sandakan, requesting for the notes of proceedings; and

(g) the secretary to the learned High Court judge in Sandakan had written on 30 December 1996 to the Senior Assistant Registrar, High Court Miri, requesting that the notes of proceedings be forwarded to the appellant.

In his oral submissions, the learned counsel for the appellant conceded that the notice of appeal was not personally served on the respondent. This was due to counsel's oversight. Nevertheless, the learned counsel contended that the exh. 'JAT 2' showed that the respondent was aware of the notice of appeal. As to merits, the learned counsel claimed that there was forgery of the memorandum of transfer. The question of burden of proof as regards forgery is a point of law in issue. The learned judge, according to the learned counsel, had held that the burden of proof is beyond reasonable doubt. The learned counsel, however, argued otherwise.

In reply, the learned counsel for the respondent stressed that para. 4 of the affidavit-in-support did not explain why the notice of appeal was not served on the respondent. The learned counsel also pointed out that the affidavit-in-support did not contain any explanation as to why the appellant applied to court late. As regards merits, the learned counsel submitted that the judgment talked of fraud and consequently the decision of the learned judge on the burden of proof was correct.

The learned counsel for the appellant submitted a number of authorities in support of his submissions, one of which was the case of *Soh Keng Hian v. American International Assurance Co. Ltd.* [1996] 1 MLJ 191. This court in that case had also to consider an application similar to the one now before us. Gopal Sri Ram, JCA, in delivering the judgment of the court stated:

> It is axiomatic that this court is seized of a wide discretion to extend time in proper and deserving cases. But, it is not an unprincipled discretion. There must be some relevant evidential material made available before the court may exercise discretion.

In the case presently before this court, the evidential material made available by the appellant are in the affidavit-in-support of the motion. Exhibit 'JAT 2' shows that the notice of appeal was sent. But there is no proof of 'JAT 2' having been mailed or faxed to the respondent. In fact, the appellant's counsel conceded that the notice of appeal was never served personally on the respondent due to an oversight of counsel. This, however, was never mentioned in the affidavit-in-support. What was the nature of the oversight too, was never particularised in the affidavit-in-support. What is clear from the affidavit-in-support is that the High Court delivered its decision on 22 November 1996. This means that the notice of appeal should have been served by 22 December 1996. Despite this, the appellant only filed this motion on 13 January 1997. Yet the affidavit-in-support does not disclose any explanation as to why the notice of appeal was not served on the respondent nor any reasons as to why the motion was only filed on 13 January 1997 and not earlier. There is, therefore, no evidential material on the reasons for the non-service of the notice of appeal and the delay in making the application. These factors were considered by us when exercising the discretion to grant or not the application for the extension of time (see *Pearson v. Chen Chien Wen Edwin* [1991] 3 MLJ 208).

As regards the filing and serving of the record of appeal, para 6 of the affidavit-in-support shows that the appellant had applied for the notes of proceedings but had not, until the date of filing of their motion, that is 13 January 1997, received them from the High Court. There is no evidential material that can explain why the appellant did not comply with the *Court of*

Appeal's Practice Direction No. 1 of 1996 which, amongst other things, require the appellant to immediately apply to the President of the Court of Appeal for extension of time to file the record of appeal in the event that the notes of evidence had not been supplied to the appellant within one month from the date the notice of appeal was filed. In *Yeo Yoo Teik v. Jemaah Pengadilan Sewa, Pulau Pinang & Anor.* [1996] 2 MLJ 54, this court had commented on the non-compliance of *Practice Direction No. 2/91*. Siti Norma Yaakob, JCA, in delivering the judgment of the court said:

> Practice Direction 2/91 has been especially framed to regulate the procedure governing the filing of appeal records. Although it does not have the force of law, nonetheless it must be strictly adhered to so that there is a systematic and consistent procedure governing the filing of appeal records in this court.

We find no evidential material that can throw any light on the merits of the present application. A similar situation arose in *Yeo Yoo Teik's* case *(supra)* and Siti Norma Yaakob, JCA, commented:

> We also took note of the fact that the affidavit-in-support makes no mention of the factual circumstances surrounding the cause of action leading to the order appealed against. It was only before us that counsel attempted to remedy the deficiency of his affidavit by offering to state that the appeal arose out of a Rent Tribunal matter, for which prohibition had not been granted. It would have assisted us if counsel had at least alluded to some facts or law in his affidavit so as to show at least an arguable case. The failure to do so coupled with the delay of four weeks for which no acceptable explanation had been given, left us with no choice but to dismiss the application with costs.

In fact, in *Pearson's* case *(supra)*, the chances of the appeal succeeding was one of the factors considered by this court when exercising its discretionary powers to extend time.

In the light of what had been said above, we found that there were no sufficient grounds to grant an extension of time to serve the notice of appeal and to file and serve the record of appeal on the respondent. We, therefore, dismissed the motion with costs. And as the notice of appeal had never been served on the respondent, the appeal therefore was incompetent (see *Soh Keng Hian's* case *(supra)*). There was, in fact, no appeal in existence (see *Lee Lan v. Lim Yoon Loy & Ors.* [1991] 3 MLJ 419. On this ground, we struck out the appeal.

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